U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 December 2002

In the Matter of:	
DANIEL S. SOMERSON, Complainant, v. MAIL CONTRACTORS OF AMERICA, INC., Respondent.	CASE NO: 2002-STA-44

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT AND CERTIFYING FACTS RELATING TO INTIMIDATION AND HARASSMENT OF WITNESSES AND COUNSEL TO FEDERAL DISTRICT COURT

This proceeding involves a claim by Daniel S. Somerson ("Complainant") pursuant to Section 31105 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. §2301 et seq., and applicable regulations issued thereunder at 29 CFR, Part 1978. The case was assigned to this tribunal on August 7, 2002, and an initial portion of the hearing was conducted in the U.S. Court House in Jacksonville, Florida, from September 10-19, when the hearing was suspended at the request of the parties. The hearing was scheduled to resume on December 2, 2002, but resumption was canceled to accommodate resolution of the issues raised by Respondent's Motion Seeking Protective Order and Witness Interview Restriction, and the ensuing Order To Show Cause issued by this tribunal, and the unavailability of an appropriate hearing facility in Jacksonville.

Subsequent to the suspension of the hearing on September 19, however, Complainant has sent anonymous e-mails to two witnesses and counsel for Respondent, and activated websites dedicated to haranguing counsel for Respondent, all with the unmistakable intent to harass and intimidate. Because threatening and harassing witnesses and an officer of the court overtly attempts to impede the administration of justice, and because Complainant previously has been sanctioned by a U.S. District Court for misbehavior related to a prior hearing before the Office of Administrative Law Judges of the U.S. Department of Labor ("OALJ"), and accordingly was on clear notice that such behavior would not be tolerated, this tribunal ordered him to show cause why his complaint should not be dismissed and why the facts relating to the misconduct alleged should not be certified to the District Court, which retained jurisdiction over the subject of Complainant's conduct in proceedings before the OALJ. Complainant's response that he has a First Amendment right to engage in such conduct is unconvincing if not fatuous. Based on the facts and circumstances leading up to this juncture of the hearing, this tribunal finds that the complaint should be dismissed with prejudice pursuant to the implicit authority provided in 29 CFR §18.29 and §18.36, because of the intentionally

EXHIBIT 1

provocative and pernicious character of the behavior, because of Complainant's adamant unwillingness, despite ample notice, to conform his behavior to proper and reasonable norms in connection with the prosecution of his claim, and because it is manifest that the imposition of less severe sanctions would be futile. The facts should also be certified to the U.S. District Court, Middle District of Florida, Jacksonville Division.

Background

On November 7, 2002, Respondent filed a Motion Seeking Protective Order and Witness Interview Restriction relating to Complainant's alleged transmission of anonymous e-mails to persons named as witnesses in this case and to Respondent's counsel, and alleged establishment of anonymous websites directed at Respondent's counsel.[1] The exhibits submitted by Respondent to document the communications contain vulgar, abusive, and implicitly threatening messages.[2] On November 14, 2002, this tribunal issued an Order To Show Cause why the pending complaint should not be dismissed with prejudice pursuant to 29 CFR §18.29 and §18.36 because of Complainant's alleged misconduct.[3] Complainant was also directed to show cause why the facts of the harassment and intimidation of the witnesses and counsel, apparently by Complainant, should not be certified to the U.S. District Court, Middle District of Florida, Jacksonville Division, which has retained jurisdiction over a Consent Order issued in response to Complainant's abusive misbehavior during a prior STAA proceeding involving the same Respondent before Administrative Law Judge Richard E. Huddleston. *In re Daniel S. Somerson*, No. 3:02-cv-121-J-20-TEM (D.C. M.D. Fla. Apr. 8, 2002) That Consent

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[1]Complainant's persistent efforts to disqualify counsel during the proceedings have been overruled.

[2]For convenience, copies of the several communications which Respondent identified as Attachment "A" in its Motion filed November 7, 2002, as cause for relief and which are the basis for the Order To Show Cause issued by this tribunal are attached hereto as Exhibit A. The second and fifth pages of the exhibit, marked (a) and (b), respectively, are deemed in particular to be threatening communications to witnesses in this case. The applicable Consent Order of the U.S. District Court, Middle District of Florida, Jacksonville Division, and appurtenant documents, of which this tribunal takes judicial notice, are attached hereto as Exhibit B. Complainant's submission dated November 20, 2002, purporting to respond to the Order To Show Cause is attached hereto as Exhibit C. Complainant's supplemental citations submitted December 2, 2002, is attached hereto as Exhibit D.

[3]29 CFR Part 1978, which provides rules for implementing §405 of the STAA, provides that those regulations together with the rules at 29 CFR Part 18 set forth the procedures for litigation before administrative law judges. Section 1978.115 also provides authority to Secretary and administrative law judges in special circumstances to issue for good cause shown such orders as justice or the administration of §405 requires. Section 18.1(a) provides that "[t]he Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order, or regulation." Those Rules do not appear to have direct application to the particular circumstances of this case.

Order directed Complainant to

> conduct himself within the bounds of appropriate respect and decorum, albeit with allowance for appropriate zeal and vigor, during any proceedings, and any matter related thereto, held under the authority of the Office of Administrative Law Judges, U.S. Department of Labor, and regarding any other official purpose with any person or organization of the Office of Administrative Law Judges, U.S. Department of Labor, wherein Daniel S. Somerson is a party, a representative, a witness or other participant.

Complainant was directed by this tribunal in the Order To Show Cause to admit or deny that he was the originator of the communications complained of, and was advised that failure to admit or deny would be deemed an implicit admission.

Complainant's response to the Order To Show Cause issued by this tribunal was submitted on November 20, 2002.[4] In the response Complainant declared that he "stands on his prior responses to the Respondent's filings and the Court's Show Cause Order and moves for the Court to lift the stay and to kindly rule on discovery matters."[5] On December 2, 2002, Complainant filed a string of

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[4]The return date for the Order To Show Cause was extended from November 18 to November 25, 2002, to accommodate the representation by Complainant's counsel that he was too ill to respond by November 18.

[5]The Order To Show Cause was faxed to the parties and counsel, in accordance with practice in this proceeding. The same day that the Order To Show Cause was issued, November 14, 2002, Complainant filed a motion to vacate the Show Cause Order or extend time for response. The motion contained various contentions, related for the most part to the assertion of an unqualified right of free speech in regard to the order, and demands for relief, including the request for extension of time to respond. In addition, however, attached to the motion are two extraneous documents: a "Confidential Civil, Criminal and Administrative Complaint Against United States Department of Labor Chief Administrative Law Judge John Vittone," dated November 8, 2002, addressed to the DOL Inspector General, and a "new STA complaint of improper Mail Contractors of America management coercion, intimidation and harrassment–vengeful activities intended to induce DOL Judge Edward Terhune Miller to grant an unlawful dismissal of his pending DOL whistleblower case on the basis of Mr. Somerson's First Amendment and whistleblower protected activity..." and "nam[ing] Mr. Oscar Davis and Friday, Eldridge and Clark as Respondents because their actions appear to cross the bounds of zealous representation and are little different than the intimidation of civil rights plaintiffs during the 1950s and 1960s," addressed to OSHA. The reason for these submissions was not stated. The submission of the complaint filed against the Chief Judge, especially since it has no relevance to the issues in this case, may be intended as an implicit threat against this tribunal. The new complaint against counsel, as well as Respondent, which is not directly relevant to the pending complaint, has the obvious attributes of continuing harassment of counsel.

supplemental citations.[6] On December 5, 2002, Respondent filed an Opposition to Complainant's Supplemental Citations and Support for Dismissal Sanction.

Complainant's response to the Order To Show Cause conspicuously ignores the concerns raised in the Order To Show Cause, which were precisely directed to the e-mail communications of implicitly threatening nature, and e-mail and website characterizations directed at Respondent's counsel that are provocative, vulgar, and egregiously abusive. Rather, the response recites unfocused, inchoate, and verbose allegations referring to First Amendment rights.[7] Complainant's response is fairly construed as a defiant declaration that Complainant will not conform his behavior to reasonable or generally acceptable norms or cooperate with this tribunal in the orderly conduct of the hearing

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[6]Complainant's string of supplemental citations filed on December 2, 2002, apparently involve controversies related to the First Amendment. It is a truism that the First Amendment of the Constitution has wide protective scope. However, the relevance of the citations by the Complainant to the particular circumstances and issues before this tribunal is not explained, and is not apparent from the connected parentheticals. Neither the facts nor the law of these citations are elucidated or related to the particular issues raised by the Order To Show Cause. Nor is there any indication that any of the cases cited might somehow condone the intimidation and harassment of witnesses and counsel by Complainant presently at issue in this case.

[7]In his response of November 20, 2002, Complainant makes impertinent assertions and intemperate characterizations that go beyond appropriate zeal and vigor, and are disrespectful to the dignity of this tribunal, burdensome, and a waste of this tribunal's time. Specifically, the suggestion that this tribunal had ruled that activities on Complainant's website after his termination are irrelevant obviously applies to the merits of the Complainant's termination by Respondent, not to contumacious conduct affecting the orderly processes of adjudication. Worker criticism of employers' actions or large organizations referred to by Complainant is not pertinent. Nor is the right to litigate, which is not in issue. Criticism of judicial conduct is not in issue or a present factor in the proposed sanction. Nor is prior restraint of free speech. Citations to authorities involving journalists' publications are not related to the issues addressed in the Order To Show Cause. Complainant's suggestion that any order against Complainant based upon Respondent's website surveillance would be poisoned by that surveillance is manifestly frivolous, since any such publication on the website would be by its very nature an invitation to be seen, and, if directed against Respondent or its agents or counsel, would presumably be intended to be seen by them among others. Moreover, the *ad hominem* communications which are the subject of the Order To Show Cause, and which have nothing whatever to do with safety or fatigue as it applies to truckers, or indeed anything except implicit threats, and scurrilous insults in the nature of harassment, are not protected activity in issue under the STAA The unspecified accusations of STAA violations against Cole, to the extent that they are not blatant harassment, would presumably have been presented for the orderly adjudication process invoked by his claims previously or pending before this tribunal. In general, the response to the Order To Show Cause filed by counsel on Complainant's behalf, presumably with Complainant's knowledge and approval, is characterized by belligerence, lack of rational argument, presentation of irrelevant matters, and general disrespect for the authority of this tribunal.

pending before it in conformity with the Consent Order or otherwise. Complainant also refused to admit or deny whether he was the source of the e-mails and websites, asserting:

> Any effort to compel Mr. Somerson to give testimony on his own (others') web activities would invade the First Amendment and violate DOL whistleblower precedents. Before Respondent asks any questions relating to protected activity, Respondent should be ordered to post a bond equal to the lifetime future income (with retirement benefits) of all persons concerned, so as to protect against retaliation. See, Management Information Technologies v. Alyeska Pipeline Service Co., 151 F.R.D. 478 (D.D.C. 1993)(Judge Stanley K. Sporkin)(barring employers asking whistleblower identification questions unless defendants post a bond equal to whistleblowers' lifetime future income, benefits and pension and other retirement, protecting them from retaliation).

Findings of Fact and Conclusions of Law

Based on Complainant's failure to admit or deny[8] that he was the source of the e-mails and websites complained of by the Respondent,[9] and the circumstances of this case which clearly support

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[8]An administrative law judge has the authority to question witnesses. 29 CFR §18.29(a)(2); *United States v. Pierce*, 62 F.3d 818, 834 (6th Cir. 12995)(questioning by a trial judge is appropriate since "[t]he trial judge's duty is to conduct a trial in an orderly fashion and obtain truth and justice"); *Shusterman v. Ebasco Servs. Inc.*, 1987-ERA-27 (Sec'y Jan. 6, 1992); *Duncan v. Sacramento Metro. Air Quality Management Dist.*, 1997-CAA-12 (ALJ Oct. 16, 1998)(order denying motion). Complainant's citation of *Management Information Technologies, supra*, as grounds for refusal to admit or deny that he was the source of the threatening and harassing e-mails and websites is manifestly inapposite. In that case, the court held that the defendants were not entitled to compel production of documents received by the plaintiff from confidential sources within a pipeline company that might betray the identities of those providing information on the company's alleged environmental abuses, where the identities of the confidential sources were not crucial, either specifically for the defense or for the broader purpose of additional discovery. The instant inquiry, however, is about conduct by the Complainant which attempts to disrupt the hearing process, and which is not even arguably protected conduct. Unlike *Management Information Technologies*, this case involves a judicial inquiry into apparent misconduct of a litigant, rather than a ruling on discovery relating to the merits of the case. By contrast, Complainant has aggressively promoted his identity as a whistleblower.

[9]The websites in question are www.geocities.com/oscardavissucks, www.mailcontractorssucks.hpg.ig.com.br/, and www.oscardavissucks.hpg.ig.com.br/, not Complainant's www.truckingsolutions.com website. This tribunal has not viewed any of Complainant's websites, except insofar as printed pages from those websites have been submitted in filings by the parties. This tribunal has not viewed the www.truckingsolutions.com website because it is involved with one of the primary issues raised by the complaint, and this tribunal has been put on notice that Complainant has posted material about the undersigned on that site

the inference that Complainant is responsible for the communications in question, this tribunal finds that Complainant was the originator of those communications.

The e-mails and web pages submitted by Respondent in support of its motion consist of twelve documents. Those documents were attached as Attachment "A" to the motion. One e-mail of a threatening nature was sent to a prospective witness, Eli Gray. Two e-mails, one of which had a threatening tone, and the other of which was egregiously abusive, were sent to the witness Larry Cole, who had previously testified and has been identified by Complainant for recall.[10] The remaining samples reflect extremely abusive, hostile, and often vulgar insults directed at Respondent's counsel. This tribunal finds that, under the circumstances, the communications were intended to intimidate, harass, and threaten participants in the proceedings being conducted by this tribunal. This tribunal finds that these communications are inconsistent with fair, orderly, and dignified process in the resolution of disputes properly before this tribunal.

A party's threatening or harassing witnesses and opposing counsel is a basic trespass upon the integrity of the judicial process. Interference with witnesses testifying before a Federal agency is a very serious matter, as has been explicitly recognized by the Secretary. *See Remusat v. Bartlett Nuclear, Inc*., 94-ERA-36 (1996), 1996 WL 171434 (DOL Off.Adm.App.) at 5 fn.5 (citations omitted).[11] The United States Code criminalizes any endeavor to influence, intimidate or impede any witness in any proceeding before any department or agency of the United States. Confronted with

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against the advice of his counsel. *See Somerson v. Mail Contractors of America, Inc*., 2002-STA-44 (Sept. 6, 2002)(Order Denying Advisory Opinion).

[10]The November 5, 2002, e-mail directed to Eli Gray was titled "ELI GRAY WEARING STRIPES," and suggests that "criminal charges and resulting indictments" for "conspiracy, racketeering" are imminent, and demands, "Turn yourself in before we have to hunt you down like a dog." The October 8, 2002, e-mail directed to Larry Cole was titled "Every breath you take, every move you make, I'll be watching you," and opens, "You asked for it *shithead*, now you gotta BELLY-FULL of trouble. (You ain't seen nothin yet)" Among other things, it accuses Cole of "EXTREME perjury" in the pending case. Though the precise meaning of these communications is not unambiguous, this tribunal finds that the e-mails, even if they were interpreted not to explicitly threaten physical harm, are intentionally and unambiguously harassing and threatening in tone. *See generally United States v. Shoulberg*, 895 F.2d 882, 884-85 (2d Cir. 1990)(alternative explanations for apparently threatening words do not prevent trier of fact from drawing reasonable inferences from the words used and the pertinent circumstances). Furthermore, these communications have occurred while Complainant is constrained to conduct himself within the bounds of appropriate respect and decorum pursuant to the Consent Order entered by the U.S. District Court on April 8, 2002.

[11]The propriety of contacts with Respondent's witnesses on behalf of Complainant has been an ongoing issue in this case, as is made evident, *inter alia*, by Respondent's request for protection in this regard in the motion for protective relief that precipitated the Order To Show Cause.

an allegation suggesting such interference, this tribunal elected in the circumstances of this case to issue the Order To Show Cause as an initial response to an indication of a serious trespass upon the integrity of the proceedings before it. Complainant's response is rambling and vague, but clearly reflects an uncompromising attitude that mere reference to First Amendment rights provides him with total license to engage without restraint or limitation of any kind in the type of abusive behavior complained of by Respondent and identified by this tribunal as potentially sanctionable in the Order To Show Cause. Such a view of the First Amendment is insupportable.

The United States Supreme Court has held that "potentially expressive activities that produce special harms distinct from their communicative impact...are entitled to no constitutional protection." *Roberts v. United States Jaycees*, 468 U.S. 609, 628, 104 S. Ct. 3244, 3255 (1984). Thus, attempted intimidation or harassment of a witness or counsel for the opposing party is not protected speech. *See United States v. Shoulberg*, 895 F.2d 882, 886 (2d Cir. 1990)(threat to intimidate witness not protected by First Amendment); *United States v. Velasquez*, 772 F.2d 1348, 1357 (7th Cir. 1985), *cert. denied*, 475 U.S. 1021, 106 S. Ct. 1211 (1986)("A threat to break a person's knees or pulverize his automobile as punishment for his having given information to the government is a statement of intention rather than an idea or opinion and is not part of the marketplace of ideas.") Based on the documentation presented by Respondent, Complainant's lack of denial that he was responsible for the communications, and the lack of Constitutional protection for statements intended to harass and attempt to intimidate witnesses and an officer of the court, this tribunal finds that Complainant has engaged in sanctionable conduct in this case.

Certification of facts to the United States District Court

Complainant's response to this tribunal's Order To Show Cause does not present a credible argument as to why his conduct in this case should not be certified to the United States District Court for appropriate action. This tribunal finds that Claimant's abusive and threatening e-mails and websites are in clear violation of the Consent Order executed and issued in *In re Daniel S. Somerson*, No. 3:02-ev-121-J-20-TEM (D.C.M.D. Fla. Apr. 8, 2002). Accordingly, this order with attachments will be submitted to that court as a certification of apparent violation of the Consent Order by Complainant.

Sanction for abuse of witnesses and opposing counsel

The motion filed by Respondent that prompted this tribunal's Order To Show Cause sought a protective order against the abusive e-mails and websites and certain restrictions on Complainant's contacts with a prospective witness. However, intimidation of witnesses and opposing counsel is an extreme manifestation of misconduct, especially in view of Complainant's prior admonishment in the recent proceeding before Judge Huddleston, which led to the Consent Order entered by the U.S. District Court. Intimidation and harassment of witnesses is not protected activity and is within the ambit of conduct proscribed by 18 U.S.C. §1505, which prohibits any endeavor to influence, intimidate or impede any witness in any proceeding before any department or agency of the United States. Complainant's response to this tribunal is, in effect, a manifesto of contempt for the concerns and the burdens his behavior imposes upon the legal process of this tribunal. It defiantly establishes

that Complainant is not able or willing to conform his behavior to reasonable norms, as generally recognized, as required by governing regulations, and the Consent Order generated by his misbehavior at the prior proceedings to which he was a party.

The authority of federal courts to dismiss cases to sanction conduct by a party or counsel that is disrespectful to the court and to deter similar misconduct in the future, even absent a showing of prejudice to the other party is well established. *See generally, Chambers v. Nasco, Inc.*, 501 U.S. 32, 111 S. Ct. 2123 (1991)(Dismissal of lawsuit is a particularly severe sanction for conduct that abuses judicial process, but is within discretion of federal court.); *Lightning Lube, Inc. v. Witco Corp*, 4 F3d 1153, 1178-79 (3d Cir. 1993); *Shea v. Donohoe Constr. Co.*, 795 F. 2d 1071 (D.C. Cir. 1986)(Prejudice to other party, severe burden on judicial system not mitigated to lesser sanction, punishing abuse and deterring misconduct are rationales supporting dismissal based on counsel's misconduct, but often requires showing that client deserves sanction.); *Televideo Systems, Inc. v. Heidenthal*, 826 F.2d 915, 916-17(9th Cir. 1987)(Courts have inherent powers to dismiss actions or enter default judgments for failure to prosecute, contempt of court, or abusive litigation practices, though sanction for cause unrelated to merits of controversy may violate due process.) Similarly, the regulation at 29 CFR §18.29 provides the administrative law judge with all powers necessary to the conduct of fair and impartial hearings. When sanctions need enforcement, authority is provided for recourse to the appropriate Federal District Court.

Dismissal of Complainant's case pending before this tribunal does not require such recourse for enforcement when exercised, as here, for the purpose of regulating the conduct of the proceedings pursuant to the necessary and appropriate powers vested in the Secretary of Labor. §18.29(a)(7). Persons appearing in proceedings before this tribunal are expected to act with integrity, and in an ethical manner in accordance with 29 CFR §18.36.[12] Violations are subject to sanction, up to, and including dismissal of the cause. *See Cohen v. Roberts Express*, 1991-STA-29 (Sec'y Feb. 11, 1992)(Secretary's approval of dismissal under 29 CFR §18.6(d)(2)(v) by administrative law judge of case where the Complainant failed to accept certified mail, had not responded to several orders issued by the administrative law judge, and had not responded to telephone communications from the administrative law judge.)[13] The misbehavior in the instant case is far more serious than that which

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[12]The Administrative Review Board has recognized its inherent authority to demand that all litigants including pro se litigants comport themselves with a measure of civility and respect for the tribunals that hear their cases. *See More v. R & L Transfer, Inc.*, ARB No. 01-044, ALJ No. 2000-STA-23 (ARB June 28, 2001), *citing Pickett v. TVA*, ARB No. 00-076, ALJ Nos. 99-CAA-25, 00-CAA-9 (ARB Nov. 2, 2000).

[13]The Secretary in *Cohen* observed that STAA proceedings are governed by the regulations at 29 CFR, Part 1978, and ruled that when no provision in Part 1978 covers the situation at issue, the regulations at 29 CFR, Part 18 are applicable. 29 CFR §1978.106(a). Part 18 provides that where a party fails to comply with any order of an administrative law judge:

> the administrative law judge, for the purpose of permitting resolution of the relevant issues and disposition of the proceeding without unnecessary delay despite such failure, may take such action in regard thereto as is just, including but not

justified dismissal in *Cohen*. If there is inherent authority to demand that all litigants including *pro se* litigants comport themselves with a measure of civility and respect for the tribunals that hear their cases, a fortiori there is such power to act where a party threatens or harasses witnesses in a pending case.

In *Somerson v. Mail Contractors of America*, 2002-STA-18 and 19 (ALJ Feb. 20, 2002), in which Complainant was recently involved and of which this tribunal takes judicial notice, Judge Huddleston found that Complainant's actions required dismissal of the case for specified misconduct, including willful and intentional violation of court orders, abuse of personnel during telephone calls, and disruption of the conduct of the formal hearing. He recounted his authority as administrative law judge in this respect pursuant to the general grant of authority to regulate the course of the hearing, subject to published rules of the agency, under the Administrative Procedure Act, 5 U.S.C. §556(c). He also cited The Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges at 29 CFR Part 18, which include in §18.36 (Standards of Conduct) that all persons appearing are expected to act with integrity, and in an ethical manner, and that an administrative law judge may exclude parties, participants, and their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition against ex parte communications. He also cited a range of sanctions provided under §18.6(d)(2).

This tribunal also deems it significant that, prior to his appearance before Judge Huddleston, Complainant had prosecuted complaints alleging discrimination under the STAA by a different respondent on behalf of himself and another employee. *Somerson v. Yellow Freight System, Inc.*, 1998-STA-9 and 11 (ALJ Feb. 18, 1999) On appeal, the Administrative Review Board, which dismissed the complaints, declined to dismiss the complaints on the ground that Complainant repeatedly engaged in improper conduct during the hearing before the administrative law judge, explaining,

> A review of the hearing transcript leaves little doubt that Somerson engaged in defiant and impertinent conduct that hindered his ability to present a coherent case, and would have resulted in disciplinary action in a federal district court. It is also plain that Somerson was loud and abusive toward Yellow Freight's counsel, witnesses, and the ALJ....We deplore the manner in which Somerson disrupted the hearing, and abused the parties, witnesses, and ALJ in this case. However, we are not in a position to second guess the ALJ's decision regarding how to control his courtroom. Moreover, there is no regulation that would allow this Board to impose the sanction of dismissal for improper conduct, per Yellow Freight's motion.

Somerson v. Yellow Freight System, Inc, ARB No. 99-005 (ARB Feb. 18, 1999)(Final Decision and

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> limited to...(v) [ruling]...that a decision of the proceeding be rendered against the non-complying party....

29 CFR §18.6(d)(2).

Order at slip op. pp. 18-19). The administrative law judge, on the other hand, has an affirmative grant of authority to conduct fair and impartial hearings under §18.29. The Administrative Review Board noted that the administrative law judge clearly would have been acting within his authority under 29 CFR §18.36 had he barred the Complainant from the proceeding. Instead, the administrative law judge had attempted in his sound discretion to persuade Complainant to comply with standards of proper conduct and his orders. The futility of that course of action can now be inferred from the course of the subsequent proceedings before Judge Huddleston and this tribunal, as well as those before the United States District Court which issued the Consent Order. It would have been inappropriate for this tribunal to have anticipated the behavior in question and to have ordered the Complainant not to have threatened or harassed witnesses prior to the occurrence. Likewise, this tribunal could hardly have anticipated the particular harassment of counsel, which Complainant adamantly insists is protected as free speech, in such a way as to have prevented the deleterious effects on the dignity and integrity of the hearing process. Yet the impropriety of Complainant's conduct which has occurred is self-evident. It is clear, therefore, that the administrative law judge who conducts the hearing must act to protect the integrity and dignity of the proceedings before him or her. Where that integrity and dignity have been sufficiently impaired, and the circumstances warrant the severity of the sanction, this tribunal must be deemed, not only to have authority to exclude the party from the proceedings, which would be tantamount to dismissal, but to have inherent judicial power to end the proceedings with a dismissal of the case pursuant to the implicit authority granted to administrative law judges in 29 CFR §18.29. *See generally, Chambers v. Nasco, Inc.*, 501 U.S. 32, 111 S. Ct. 2123 (1991).

Although Complainant appeared before Judge Huddleston *pro se,* in circumstances that vary somewhat from those in this case, where Complainant has been represented by counsel, it is clear from Complainant's response to the Order To Show Cause that he has no intention of conforming his conduct to reasonable norms. When it descends to the level of witness intimidation and harassment, and harassment of opposing counsel, an officer of the court, Complainant's behavior is indefensible under any claim of appropriate zeal and vigor in pursuit of a claim. This tribunal is persuaded that issuance of a protective order and other directives relating to Complainant's communications with and about witnesses and opposing counsel would be futile, as is evident from complainant's actions in this case, including his extensive pleadings filed by counsel on his behalf, and as described in decisions relating to prior proceedings before the Office of Administrative Law Judges. It is absolutely clear that Complainant is simply not willing to respect the integrity and decorum of proceedings before OALJ or this tribunal. Continuation of the instant proceedings would only serve to permit Complainant to attempt to continue his abuse of judicial process to harass and intimidate. Dismissal of a complaint for misconduct is an extreme sanction, but the obvious bad faith and the intentional compromise of the integrity of the hearing process and Complainant's history of contumacious conduct in proceedings before the Office of Administrative Law Judges establish that lesser sanctions would be ineffective in regard to his abusive behavior.

The threatening communications to and harassment of the two witnesses in the circumstances of this case, in and of themselves, and, in addition, those circumstances considered in light of the terms of the Consent Order filed on April 8, 2002, in the United States District Court, Middle District of Florida, Jacksonville Division, justify the severe sanction of a dismissal of this case. In addition,

the abusive communications directed at Respondent's counsel are sanctionable as burdensome to and contemptuous of the integrity and orderly process of this tribunal. 29 CFR §18.29 provides the administrative law judge with all powers necessary to the conduct of fair and impartial hearings.[14] Persons appearing in proceedings before this tribunal are expected to act with integrity, and in an ethical manner in accordance with 29 CFR §18.36. Violations are properly subject to sanction. Here there is the unmistakable pattern of contumacious conduct which is essential to imposition of the dismissal sanction, where a lesser sanction would not better serve the interests of justice. *See Billings v. TVA*, 89-ERA-16(Sec'y Final Dec./ and Ord., July 29, 1992), *aff'd*, 25 F.3d 1050 (6th Cir. 1994); *Trocanna v. Arctic Slope Inspection Service*, 97-WPC-1 (ARB Nov. 6, 1997) Complainant has had ample notice thereof and opportunity to restrain his behavior to the bounds of appropriate respect and decorum in the forum where he has sought relief through adjudication of his complaint.

RECOMMENDED ORDER

Based on the foregoing, it is ORDERED that this case be dismissed with prejudice. The facts hereof shall be certified to the United States District Court, Middle District of Florida, Jacksonville Division, for such action as may be deemed appropriate in respect of the specified violation of the Consent Order filed on April 8, 2002, *In re Daniel S. Somerson*, Case No. 3:02-cv-121-J-20-TEM.

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EDWARD TERHUNE MILLER
Administrative Law Judge

Washington, D.C.

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[14]Certain powers are enumerated under §18.29, but explicitly without limitation. The Supreme Court has recognized the functional equivalence of administrative law judges with judges of the federal courts. *See Butz v. Economou*, 438 U.S. 478, 514 (1978). Barring Complainant from the forum whose authority he has invoked to adjudicate his claim because of his disrespect for that process would be tantamount to dismissal of the claim. Dismissal is an inherent power of judicial action in an appropriate case and does not, like other sanctions, require recourse to a Federal District Court to be effectively implemented by this tribunal.

Redaction Notice: This page, and the following 12 pages of this document ,include redactions of telephone numbers and e-mail addresses

ATTACHMENT "A"

EXHIBIT A

Eli Gray

From: Anonymous-Remailer@See.Comment.Header
Sent: Tuesday, November 05, 2002 11:01 AM
To: [redacted]
Subject: ELI GRAY WEARING STRIPES :)

gray-

aka/'POPE'

Now all that remains are the criminal charges and resulting indictments.

Conspiracy, racketeering, to name a few ;)

You best think about telling the truth 'boy' ;-)

Turn yourself in before we have to hunt you down like a dog.

(a)

Larry Cole

From: Anonymous [nobody@mail.jmbcv.net]
Sent: Tuesday, November 05, 2002 1:48 AM
To: [redacted]
Subject: JUDGEMENT DAY PALLY :)

"protected species, tippy toe around, sit there and do nothing and he will go away. Take all of his written and verbal crap and turn the other cheek"

"I should have asked him 'do I need to tell them to bring an ambulance or a hearst'

Learn how to spell you ignoramous.

Most useful information though. (thanx)
Certain to be 'Properly desiminated'
throughout the transportation industry. :)

From: Bunker Boy <nobody@mixmaster.thebunker.net>
To: [redacted]
Date: 10/18/02 12:30PM
Subject: search engine progress report

davis (you dumb-ass redneck):

moving right along as scheduled

they just love you turkey!

http://msxml.excite.com/_1_2SLTTIB04JW1ME5__info.xcite/dog/results?otmpl=dog/webresults.htm&qkw=oscar+davis&qcat=web&top=1&start=&ver=27551

Larry Cole

From: Anonymous via the Cypherpunks Tonga Remailer [nobody@cypherpunks.to]
Sent: Tuesday, October 08, 2002 9:14 PM
To: [redacted]
Subject: "Every breath you take, every move you make, I'll be watching you"

You asked for it *shithead*, now you gotta BELLY-FULL of trouble.

(You ain't seen notnin yet)

http://www.altamahariver.net/guestbook/guestbook.html

For those of you who are interested in learning THE TRUTH
about just what kind of a person MR. LARRY COLE REALLY is,
(behind the hypocritical [nauseating] satire posted here)
I suggest you examine the INFORMATIVE URLs listed below.
Cole is TRULY evil. Cole FIRES ATTACKS AND Retaliates against
whistleblowers that keep america's workplaces
safe. Larry Cole is guilty of EXTREME perjury in a FEDERAL TRUCK SAFETY CASE
(2002-STA-44 somerson v. Mail Contractors of America)
Cole is deceitful and a born liar. This individual (and others like him in
the trucking industry) are personally responsible for needless carnage
that is occuring on our nation's highways due to fatigue and unsafe equipment.

Mr. Cole (a 'Safety Director') and his employer (Mail Contractors of America) are
engaged in a pattern and practice of harassing their truck drivers, intimidating them
to operate unsafe equipment and work when ill and/or fatigued or face losing their jobs.
Cole's company, (MCofA) is one of the most willful DOT/DOL violators in the trucking business today.
These Websites will inform all who are interested of Mr. Cole's tyranny.

May the Altamaha River and this organization never (again)
have to know of such a lawless and evil man as Mr. Larry Cole.

(b)

From: OSCAR DAVIS SUCKS! <Anonymous-Remailer@See.Comment.Header>
To: [redacted]
Date: 10/8/02 12:54PM
Subject: you're chicken

You're chicken davis ;-)

click---> http://www.truckingsolutions.com/chicken.wav

nothing closer to the truth pecker-head!

From: <mailcontractorssucks@yahoo.com>
To: [redacted]
Date: 9/24/02 10:28AM
Subject: Here on Happy Halloween

There is a Greeting Card waiting for you !
It's from Mail Contractors Sucks! at (mailcontractorssucks@yahoo.com).

To see your card try one of these ways

click on the link below

http://www.ohmygoodness.com/cgi-bin/g-card.pl?020924DAMAMMQWLUA2

or copy and paste the entire line into your browser's window

for AOL Users and for those who could not click on the above link, click below

<A HREF="http://www.ohmygoodness.com/cgi-bin/g-card.pl?020924DAMAMMQWLUA2">
http://www.ohmygoodness.com/cgi-bin/g-card.pl?020924DAMAMMQWLUA2 </A>

If you can't retrieve your card by clicking, go to our "View Your Card" page at
http://www.ohmygoodness.com/getcard.htm
and enter your key card code in the pickup window.
Your key card code is: 020924DAMAMMQWLUA2

Cards will be available for 2 weeks only. If you haven't picked up your card by then,
or if you need assistance, write to biagio@ohmygoodness.com and include the keycode in the subject.

Thank you,
This is a FREE service from
http://www.ohmygoodness.com

Postcard

Here on happy halloween
willful liars could be seen
Each wriggled and squirmed
with no end in sight
But at Halloween's end
all was made right
Donning the cuffs
and leg irons for all
Now 10 halloweens
to make sense of it all.

Mail Contractors Sucks! sent it on:
Sep 24, 2002 at 08:29 *
It is now: Sep 24, 2002 - 14:35
* PST time

From: OSCAR DAVIS SUCKS!/MAIL CONTRACTORS SUCKS-! Now in Brazil <Anonymous-Remailer@See.Comment.Header>
To: [redacted]
[redacted]
Date: 9/22/02 2:16AM
Subject: (No Subject)

Folks:

The internet brings us all closer together.

Small world isn't it?

http://www.mailcontractorssucks.hpg.ig.com.br/

http://www.oscardavissucks.hpg.ig.com.br/

From: Frog <FrogRemailer@bigfoot.com>
To: [redacted]
Date: 9/21/02 4:09AM
Subject: choke on this

CHOKE ON THIS CRACKER-HEAD!

for every '1' you take down I upload 3 more:

http://www.oscardavissucks.20m.com/

http://www.oscardavissucks.4t.com/

http://www.geocities.com/oscardavisreallysucks/

I'll bet you run out of bacon around your blubber-ball waist

before I run out of server space--you peckerhead!

From: Anonymous User <anonymous@remailer.havenco.com>
To: [redacted]

Date: 9/21/02 9:31PM
Subject: "YOU DON'T HAVE THE BALLS"

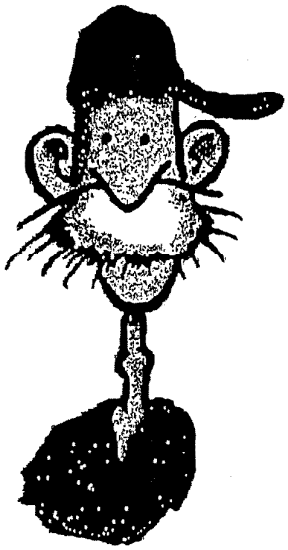
http://members.lycos.nl/mailcontractorsssucks/no-balls.wav

http://members.lycos.nl/oscardavissucks/no-balls.wav

OSCAR DAVIS SUCKS!

"IT'S A WITCH HUNT YOUR HONOR!"
"THEY'RE ON NOTHIN' MORE THAN A DERN FISHIN' EXPEDITION!"

THIS RUDE, LOUDMOUTHED HAY-SEED RACIST BAFFOON FROM ARKANSAS ACTUALLY "PRACTICES" LAW?



OFF FOR ANOTHER BOURBON!

This website is currently under construction.
Please check back soon.

CONTACT US:

OSCARDAVISSUCKS@YAHOO.COM

Main Office
400 North Tampa Street, Suite 3200
Tampa, Florida 33602
813/274-6000
813/274-6358 (Fax)

Post Office Box 600
200 West Forsyth Street, Suite 700
Jacksonville, Florida 32201
904/232-3509
904/232-2620 (Fax)

U.S. Department of Justice
United States Attorney
Middle District of Florida

2110 First Street, Suite 3-137
Fort Myers, Florida 33901
941/461-2200
941/461-2219 (Fax)

50 North Hughey Avenue, Room 201
Orlando, Florida 32801
407/648-7500
407/648/7643 (Fax)

Reply to **Jacksonville, FL**

April 9, 2002

FACSIMILE: (757) 873-3634
and
FIRST CLASS MAIL

Richard E. Huddleston
Administrative Law Judge
Office of Administrative Law Judges
603 Pilot House Drive - Suite 300
Newport News, Virginia 23606-1904

Re: **In Re: Daniel Somerson**
Case No. 3:02-cv-121-J-20TEM

Dear Judge Huddleston:

Enclosed is your copy of the Consent Order issued by Harvey E. Schlesinger, United States District Judge, Middle District of Florida. Also enclosed are copies of letters of apology from Mr. Somerson that his attorney indicated to me would be sent upon the Court's issuance of the Consent Order (though they bear a date of March 7, 2002). Hopefully, this adequately addresses the circumstances giving rise to this action and will prove beneficial for the future. Should you require further discussion, please do not hesitate to contact me at your earliest convenience.

Sincerely,

PAUL I. PEREZ
United States Attorney

RALPH J. LEE
Assistant United States Attorney

Enclosures
As stated

EXHIBIT B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

CASE NO.: 3:02-cv-121-J-20-TEM

DANIEL S. SOMERSON
_____/

CONSENT ORDER

COMES NOW the parties to Consent to the entry of the following terms as an Order of this Court regarding the circumstances giving rise to this action.

This action was commenced with the filing of the Order Certifying Facts of the United States District Court for the Middle District of Florida by Richard E. Huddleston, Administrative Law Judge, U.S. Department of Labor, pursuant to 29 C.F.R. §18.29(b). Thereafter, this cause came to be heard before this Court on February 27, 2002 pursuant to the Order to Show Cause entered on February 14, 2002. Having been duly advised in the premises and based on the consent of the parties, the Court now finds that:

Daniel S. Somerson has engaged in unacceptable conduct in connection with certain communications with the Office of Administrative Law Judges, U.S. Department of Labor, with Administrative Law Judge Huddleston and his staff, and has acted in non-compliance with certain orders and directives associated with proceedings conducted under the authority of the Office of Administrative Law Judges, U.S. Department of Labor. Specifically, Daniel S. Somerson did

1. Present for filing certain papers via facsimile instead of by U.S. Mail in violation of Administrative Law Judge Huddleston's prehearing orders and directives prohibiting the filing of said papers by facsimile,
2. Interrupt hearing proceedings and engage in impertinent conduct and discourse with Administrative Law Judge Huddleston and other hearing participants during the proceedings, and
3. Engage in impertinent and derogatory conduct and discourse during a telephone conversation with Administrative Law Judge Huddleston's law clerk.

Accordingly, based on the foregoing findings and the further consent of the parties, it is hereby **ORDERED**

1. That Daniel Somerson shall conduct himself within the bounds of appropriate respect and decorum, albeit with allowance for appropriate zeal and vigor, during any proceedings, and any matters related thereto, held under the authority of the Office of Administrative Law Judges, U.S. Department of Labor, and regarding any other official purpose with any person or organization of the Office of Administrative Law Judges, U.S. Department of Labor, wherein Daniel S. Somerson is a party, a representative, a witness or other participant,
2. That Daniel S. Somerson shall issue written apologies, based on the foregoing, to
   a. Judge Huddleston,
   b. Judge Huddleston's law clerk, and
   c. John M. Vittone, Chief Administrative Law Judge, U.S. Department of Labor, and

3. That this Court shall retain jurisdiction to enforce any violation by Daniel S. Somerson of this Consent Order and to impose any such sanction as may be provided for by law.

The following hereby CONSENT to and AGREE to the foregoing terms as an Order of this Court regarding the circumstances giving rise to this action, as evidenced by their signatures having been affixed below on the dates indicated.

DANIEL S. SOMERSON

Date: April 4, 2002

RALPH J. LEE
Assistant United States Attorney

Date: 4/4/02

MITCHELL A. STONE
Attorney for Daniel S. Somerson

Date: 4/4/02

APPROVED, DONE and ORDERED this 8th day of April, 2002 at Jacksonville, Florida. The Clerk shall close this case.

UNITED STATES DISTRICT JUDGE

cc:
Daniel Somerson
Mitchell A. Stone, Esq.
Ralph J. Lee, AUSA

[redacted]
Jacksonville, FL [redacted]

Daniel S. Somerson

Direct Dial: [redacted]

Fax: [redacted]

March 7, 2002

Chief Judge John Vittone
OALJ
800 K Street NW, Suite 400-N
Washington, DC 20001-8002

Dear Judge Vittone:

This letter is intended to address my conduct with respect to 2002-STA-18&19. While precipitated by my passion for truck safety on America's highways, *specific comments, remarks and behavior* on my part before and during the hearing were in fact inappropriate and counterproductive.

Therefore please accept my most sincere apologies.

Sincerely,

Daniel S. Somerson

[redacted]
Jacksonville, FL [redacted]

Daniel S. Somerson

Direct Dial: [redacted]

Fax: [redacted]

March 7, 2002

Judge Richard E. Huddleston
Ms. Valerie Harris
OALJ
603 Pilot House Drive-Suite 300
Newport News, VA 23606

Dear Judge Huddleston and Ms. Harris:

This letter is intended to address my conduct with respect to 2002-STA-18&19. While precipitated by my passion for truck safety on America's highways, *specific comments, remarks and behavior* on my part before and during the hearing were in fact inappropriate and counterproductive.

Therefore please accept my most sincere apologies.

Sincerely,

Daniel S. Somerson

Miller

EDWARD A. SLAVIN, JR.
P.O. BOX 3084
ST. AUGUSTINE, FLORIDA 32085-3084
(904) 471-7023

November 20, 2002
Honorable Edward Terhune Miller
United States Administrative Law Judge
800 K Street, N.W. Suite 400-N
Washington, D.C. 20001 *via fax/mail*

RE: Mr. DANIEL S. SOMERSON v. MAIL CONTRACTORS OF AMERICA. 2002-.STA-44
MR. SOMERSON'S SUPPLEMENTAL CITATIONS, MOTION TO LIFT STAY AND MOTION TO LIST RESPONDENT'S WEBSITE SURVEILLANCE AS ISSUE FOR TRIAL

Dear Judge Miller:

Mr. Somerson respectfully stands on his prior responses to the Respondent's filings and the Court's Show Cause Order and moves for the Court to lift the stay and to kindly rule on discovery matters. Mr. Somerson has complied with the Consent Order and should not be further queried or stigmatized by lawbreaking Respondent seeking to chill his free speech rights on his web site <*www.truckingsolutions.com*>. The Court has emphatically ruled that Mr. Somerson's post-firing website is irrelevant and will not be considered. There was no violation of the Consent Order. There are no sanctions in DOL proceedings, e.g., for willful labor law violators like Mail Contractors of America to invoke to threaten whistleblower free speech and civil rights. *See* Rex v. EBASCO Services, Inc., 87-ERA-6 (Sec'y, March 4, 1994); Parshley v. America West Airlines, Inc., 2002-AIR-10 (Honorable Richard T. Stansell-Gamm RDO, August 2, 2002). It is not a crime in America for a worker to criticize disgruntled employers' actions.

It is illegal to punish or censor Mr. Somerson for criticizing large organizations. This is a matter of First Amendment rights, which this Court is duty-bound to protect. 5 U.S.C. § 3105. No Government may punish citizens because of their views. *See, e.g.*, Bond v. Floyd, 385 U.S. 116 (1966). Fair trial rights must be protected. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). Litigation performs a vital role in protecting First Amendment rights. In re Primus, 436 U.S. 412, 431-32 (1978); In re Sawyer, 360 U.S. 622, 631-36 (1958). Litigation is itself a form of freedom of expression protected by the First Amendment. In re Halkin, 598 F.2d, 176, 187 (D.C. Cir. 1979); *see also* NAACP v. Button, 317 U.S. 415, 429-31 (1963). Litigation is often "a vehicle for effective political expression and association, as well as a means of conveying useful information to the public." In re Primus, 436 U.S. 412, 431 (1978). Whistleblower laws are like other labor laws patterned after the First Amendment.[1] *See, e.g.*

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[1] Worker protection laws protect free speech and are **"modeled on the First Amendment."** The Courts defer to this principle in legislative construction, *e.g.*,by borrowing the statute of limitations used in 42 U.S.C. § 1983 civil rights actions. See Reed v. United Transportation Union (UTU), 488 U.S. 319, 334 (1989):

> Congress modeled Title I after the Bill of Rights, and that the legislators intended s 101(a)(2) to **restate a principal First Amendment value--the right to speak one's mind without fear of reprisal."** Steelworkers v. Sadlowski, 457 U.S. 102, 111, 102 S.Ct. 2339, 2345, 72 L.Ed.2d 707 (1982)....

(continued...)

EXHIBIT C

Republican Party of Minnesota v. White, 534 U.S. --- (June 27, 2002)(finding unconstitutional the Code of Judicial Conduct's "announce clause" barring judicial candidates from criticizing judges' decisions). Criticism of government officials (and even government contractors and judges) is favored under our First Amendment. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964); Martin Marietta Corp. v. Evening Star Newspaper, 417 F.Supp. 947 (D.D.C. 1976); see also Ramsey v. Bd. of Professional Responsibility, 771 S.W. 2d 116, 121 (Tenn. 1989); Wood v. Georgia, 370 U.S. 375 (1962); Bridges v. California, 314 U.S. 242 (1941); Pennekamp v. Florida, 328 U.S. 331 (1946); Craig v. Harney, 331 U.S. 367 (1941); Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman, 55 F.3d 1430 (9th Cir. 1995); Oklahoma Bar Assn. v. Porter, 766 P.2d 958 (Okla. 1988). As Justice William O. Douglas stated in Craig, even "Judges are supposed to be [people] of fortitude, able to thrive in a hardy climate." 331 U.S. at 376; In re: Little, 404 U.S. 553, 555 (1972). Respondent would best heed Justice Douglas' sage 1941 advice in Craig. Instead, Respondent is thin-skinned and squealing -- in ancient Arkansas argot, "like a hog caught under a gate." Respondent seeks to gag, chill, silence, taunt and punish criticism of Mail Contractors of America, evidently not a company "of fortitude," one unwilling (or unable) to "thrive in a hardy climate." 331 U.S. at 376. Respondent is an oligopolist USPS contractor, begging the Court to stifle criticism. Therefore, Mr. Somerson filed a new OSHA complaint, requesting investigation of Respondent's speech-chilling defense tactics, a "witch hunt" (in Mr. Davis' words). Respondent begs the Court to intrude into protected activity, stop the trial, and evade the implications of the Respondent's own acts, words and admissions during eight days of trial and intensified E-mail searches -- the very "hardy climate" that Respondent fears, loathes and seeks to chill, depriving the Constitution of "breathing space." See *Id.*[2] Both the First Amendment

---

[1](...continued)
Reed v. UTU, 488 U.S. at 325 (Emphasis added).The Sixth Circuit held in a Railway Labor Act (RLA) case that it would apply the NLRA statute of limitations to an action brought pursuant to RLA. The Sixth Circuit stated that the **"same principles and rationale logically follow under each Act dealing [with] ... employer-employee relations."** Bailey v. Chesapeake & Ohio Railway Co., 852 F.2d 185, 186 (6th Cir. 1988)(Emphasis added). See also Legislative history of the Federal Water Pollution Control Act cited in Conference Report of Clean Air Act, 1977 U.S. Code Cong. & Ad. News, 1077, 1404. In so delaying, prolonging and distorting the whistleblower process, Respondent has flouted "First Amendment values," Sadlowski, *supra*.

[2] *See also*, Barry Tarlow, "First Amendment Prevents Federal Judge From Muzzling Outspoken Lawyer," 19 NACDL Champion 30 (1995); Jeffrey A. White, "Note: *Standing Committee on Discipline v. Yagman*: The Ninth Circuit Provides Substantial First Amendment Protection for Attorney Criticism of The Judiciary," 26 *Golden Gate U.L. Rev.* 115 (Spring 1996); Dean Edward McGlynn Gaffney, Jr., "Professionalism in The Practice of Law: A Symposium on Civility and Judicial Ethics in the1990s: The Importance of Dissent and The Imperative of Judicial Civility," 28 *Valparaiso, U.L.* 583 (Winter 1994); Chief Judge Judith S. Kaye, "A Symposium on Judicial Independence: Safeguarding A Crown Jewel: Judicial Independence and Lawyer Criticism of Judges," 25 *Hofstra L. Rev.* 703 (Spring 1997); Erwin Chemerinsky, "Silence is Not Golden: Protecting Lawyer Free Speech Under The First Amendment," 47 *Emory L.J.* 859
(continued...)

and whistleblower law require "breathing space." New York Times v. Sullivan, 376 U.S. 254, 271-72 (1964). The environmental whistleblower laws, like the First Amendment, are entitled to considerable "breathing space" to prevent a "chilling effect" on protected activity.[3] Respondent not give "breathing space" to Mr. Somerson's whistleblower rights: like a boa constrictor, it tried to suffocate him and thus halt his protected activity, and is now seeking to abuse this Court to extinguish his concerns, violate his rights and undermine the whistleblower laws.

As our American Founder Benjamin Franklin said, our critics are our friends" and we should learn from them. As Dr. Karl Z. Morgan, the father of Health Physics (radiation protection) wrote in his memoirs not long before his death:

> **No society that severely restricts freedom of speech will ultimately survive.**[4]

Karl Z. Morgan, *The Angry Genie: One Man's Walk Through the Nuclear Age* (Oklahoma University Press 1999). Dr. Morgan writes about how free speech was (sometimes) treasured in the early days of Oak Ridge, as when Dr. Alvin Weinberg was Director of Oak Ridge National Laboratory. Dr. Morgan writes that Dr. Weinberg

> **not only tolerated but sought employees who had the guts to disagree with them.** They did not behave like so many other [ORNL] directors who only want to look in the mirror and see a reflection of their own views. Morgan at 66.

As President Harry S Truman said, if Respondents "can't stand the heat, they should get out of the kitchen." Contrary to the American spirit, Respondent oligopolist USPS contractor wants to punish disagreement: it wants the Court compliant and the whistleblower silenced: it wants this

---

[2] (...continued)
(Summer 1998); W. Bradley Wendel, "Free Speech for Lawyers," 28 *Hastings L.Q.* (Winter 2001).

[3] Gasparinetti v. Kerr, 568 F.2d 311, 314-17 (3d Cir. 1977)(illegal restrictions on policemen's First Amendment rights); Philadelphia Newspapers, Inc. v. Hepps, 479 767, 772, 777 (1986)(O'Connor, J.)(newspaper entitled to breathing space defamation case); Hustler Magazine v. Falwell, 485 U.S. 46, 52, 56 (1988) (Rehnquist, J.) (magazine parody of TV preacher entitled to breathing space).; Keefe v. Ganeakos, 418 F.2d 359, 362 (1st Cir. 1969)(Aldrich, C.J.)(chilling effect on First Amendment illegal suspension of teacher over Atlantic Monthly article on Vietnam War); Parducci v. Rutland, 316 F.Supp. 352, 355, 357 (M.D. Ala 1970)(Johnson, C.J.)(chilling effect in illegal firing of English teacher over Kurt Vonnegut's Welcome to the Monkey House).

[4] *See also*, U.S. Constitution, Amendments. I, IV, V, VI, VIII, IX, XIV;
Tennessee Constitution:

> "Government being instituted for the common benefit, the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish and destructive of the good and happiness of humankind." Art. I, § 2.

"....The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject...." Art. I § 19.

> If our Constitution had followed the style of Saint Paul, it would have said, "But **the greatest of these is speech." In the darkness of tyranny, this is the key to the sunlight. If it is granted, all doors open. If it is withheld, none.**

--- Robert F. Kennedy, January 22, 1963, Center for Study of Democratic Institutions.

Honorable Court to act as its short order cook, or its amanuensis in a "witch hunt." See, e.g., Arthur Miller, The Crucible. Under whistleblower and First Amendment law, there can be no "gag orders" or "prior restraint" on DOL environmental protected activity. Any requests for such unconstitutional orders should be referred to the FBI and the United States District Court, whose duty is to protect free speech rights. Meanwhile, Mr. Somerson's case should not be delayed any further by Respondent's diversion.

Any effort to compel Mr. Somerson to give testimony on his own (or others') web activities would invade the First Amendment and violate DOL whistleblower precedents. Before Respondent asks any questions relating to protected activity, Respondent should be ordered to post a bond equal to the lifetime future income (with retirement benefits) of all persons concerned, so as to protect against retaliation. *See,* Management Information Technologies v. Alyeska Pipeline Service Co., 151 F.R.D. 478 (D.D.C. 1993)(Judge Stanley K. Sporkin) (barring employers asking whistleblower identification questions unless defendants post a bond equal to whistleblowers' lifetime future income, benefits and pension and other retirement, protecting them from retaliation). Mr. Somerson also respectfully notes the Respondent's latest round of retaliation bears on the need for relief sought in his Motions in Limine 1,2,3,4,5,6,7,8,9,10,12.

Respondent's continued discovery stonewalling is without foundation. Further E-mail searches must be ordered of the two backup tapes not yet searched. As documented, the value of the information sought outweighs any annoyance or expense on the part of the Respondent. *See* Seff v. General Outdoor Advertising, 11 F.R.D. 597 (D. Ohio 1951). Mail Contractors of America -- by its retaliation, blacklisting, evidence withholding and delays -- violates civil and constitutional rights to Due Process and to present evidence in a civil case. *See* Adams v. St. Francis Regional Hospital Center, 955 P.2d 1169 (Kansas 1998); Edward J. Imwinkelreid, "The blockbuster *Adams* decision," TRIAL, October 1998, 26-30. Its hardball anti-whistleblower litigation tactics themselves violate the whistleblower laws. *See* Connecticut Light & Power Co. v. Secretary of the United States Department of Labor, 85 F.3d. 89 (2d Cir. 1996). Respondent government contractor is on notice that its actions could give rise to liability under federal civil and criminal civil rights laws as well as under DOL truck safety whistleblower law.

Mr. Somerson hereby respectfully moves to include Respondent's admitted website surveillance as an issue for trial due to Respondent's injection of it into this litigation and their chilling effect on Mr. Somerson's operation of a website that criticizes Respondents. As Mr. Somerson stated in support of his renewed August 28, 2002 Motion in Limine:

> ...the Court has the power to order Respondents not to create the impression among employees that their protected activity is under surveillance, and not to engage in such surveillance. Consolidated Edison Company, 4 NLRB 71, 94 (1937), enforced, 305 U.S. 197 (1938); Atlas Underwear Co. v. NLRB, 116 F.2d 1020, 1023 (6th Cir. 1941); NLRB v. Ford Motor Co., 119 F.2d 326 (5th Cir. 1941); Press Co. v. NLRB, 118 F.2d 937 (D.C. Cir. 1940), cert. denied 61 S.Ct. 1118; NLRB v. Baldwin Locomotive Works, 128 F.2d 39, 49 (3d Cir. 1942); NLRB v. Jasper Chair Co., 138 F.2d 756 (7th Cir. 1943); NLRB v. Collins & Aikman Corp., 146 F.2d 454, 455 (4th Cir. 1944). It is well known by DOL that:-
>
> > **whistleblowers often face some type of surveillance** ...The experience can be very frightening and can add an ominous presence to the misery of blowing the whistle.... We often advise that if someone is watching you, he or she wants you to become affected by the surveillance and to act irrationally about it. It can be another way of bullying you into a mistake.

Government Accountability Project, et al. Courage Without Martyrdom -- A Survival Guide for Whistleblowers 5 (1989)(Emphasis added). An Order barring surveillance or giving the impression of surveillance will protect the integrity of the proceedings and will deter future lawbreaking. See NLRB v. Anchorage Times Publishing Co., 637 F.2d 1359, 1365-6 (9th Cir.), cert. denied, 454 U.S. 835 (1981); NLRB v. Randall P. Kane Co., 581 F.2d 1124, 1131 (9th Cir. 1978); NLRB v. Squire Shops, Inc., 559 F.2d 486, 487 (9th Cir. 1977); NLRB v. Miller Redwood Co., 407 F.2d 215, 218 (9th Cir. 1978); NLRB v. Intertherm, 596 F.2d 267 (8th Cir. 1979); Russell Stover Candies, Inc. v. NLRB, 551 F.2d 204, 207 (8th Cir. 1977); NLRB v. Speed Queen, 469 F.2d 189, 191 (8th Cir. 1973); NLRB v. Hawthorn Co., 404 F.2d 1205, 1208-09 (8th Cir. 1969); Olsen Rug Co. v. NLRB, 304 F.2d 710, 714-15 (7th Cir. 1962); NLRB v. Tidelands Marine Service, 339 F.2d 291 (5th Cir. 1964); National Phosphate Corp., 211 NLRB 567 (1974); Fotomat Corp., 207 NLRB 461 (1973); J.P. Stevens & Co., 245 NLRB 198 (1979); Laidlaw Waste Systems, 305 NLRB No. 5 (1991); *see also* Local 309, United Furniture Workers v. Gates, 75 F.Supp. 620, 625-26 (N.D. Ind. 1948); Alliance to End Repression v. City of Chicago, 742 F.2d 1007 (7th Cir. 1984); Handschu v. Special Services Divn, 349 F.Supp. 766 (S.D.N.Y. 1972); Presbyterian Church (USA) v. United States, 870 F.2d 518 (9th Cir. 1989); Philadelphia Yearly Meeting of the Religious Society of Friends v. Tate, 519 F.2d 1335 (3d Cir. 1975); Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975); Cf. Fr. Robert F. Drinan, "First Amendment Endangered" (book review) 78 Geo L.J. 2057 (1990). Injunctive relief against Mail Contractors of America engaging in surveillance or giving the impression of surveillance **must** be ordered by DOL....

Any order against Mr. Somerson by the Court based upon Respondent's website surveillance would be poisoned by that surveillance, not unlike the proverbial "fruit of the poisonous tree." The Court must reject all proposed First Amendment violations, "prior restraints," and improper attempts to use this forum for discovery on some inchoate actions Respondent retaliator Allison Brewer hinted at during trial. The Court must reject all civil rights violations. The Court must reject all censorship orders as outside the Court's *in personam* and subject matter jurisdiction. Otherwise, "[o]nly a brave soul would dare to express anything other than orthodoxy under such circumstances." White v. Davis, 120 Cal. Rptr. 94 (1975). Any and all licit or illicit pressures upon the Court to punish, inquire into, refer or sanction any alleged out-of-court protected activity must be rejected as outside the Court's jurisdiction: that is the law of the case. The stay should be lifted. Respondent's self-confessed website surveillance must be scrutinized by the Court at trial to see if Respondent's web surveillance activities may give rise to further liability and remedies under the Surface Transportation Act and DOL whistleblower precedents.

Mr. Somerson looks forward to the Court's further orders, hearing and RDO in this action.

Respectfully submitted,

EDWARD A. SLAVIN, JR.
COUNSEL FOR COMPLAINANT DANIEL S. SOMERSON

CERTIFICATE OF SERVICE

This document was on November 20, 2002 mailed/faxed to this Honorable Court and to Messrs Somerson, Davis, Moore, Bachman and Ms. Brewer, Esquires and mailed to Senior Special Agent Robert E. Tyndall (Retired) and the USPS Inspector General.
Edward A. Slavin, Jr.

Miller

EDWARD A. SLAVIN, JR.
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December 2, 2002
Honorable Edward Terhune Miller
United States Administrative Law Judge
800 K Street, N.W. Suite 400-N
Washington, D.C. 20001 *via fax/mail*

RE: Mr. DANIEL S. SOMERSON v. MAIL CONTRACTORS OF AMERICA. 2002-.STA-44
MR. SOMERSON"S SUPPLEMENTAL CITATIONS

Dear Judge Miller:

Mr. Somerson hereby respectfully provides the following supplemental citations: Talley v. California, 362 U.S. 60(1960)(First Amendment right to circulate anonymous handbills); McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995)(First Amendment protects anonymous political speech that is not actionably false); Buckley v. American Constitutional Law Foundation Inc., 525 U.S. 182 (1999)(petition circulators cannot be required to identify themselves or their funders); Reno v. ACLU, 521 U.S. 844, 117 S.Ct. 2329, 2335, 138 L. Ed. 2d 874 (1997). (Internet "constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers."); New York Times Co. v. United States, 403 U.S. 713, 718-726 (1971)(refusing prior restraint in Pentagon Papers case); Carafano v. Metrosplash.com, Inc., 207 F. Supp. 2d 1055 (C.D. Cal. 2002) (summary judgment for defendants on alleged website invasion of privacy); Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001)(First Amendment precludes enforcement of French order directed against website selling Nazi memorabilia in violation of French law); Tzougrakis d/b/a Offtherunway.com v. Cyveillance, Inc.,145 F. Supp. 2d 325 (S.D.N.Y. 2001)(summary judgment for defendants' using Internet to publish allegations of counterfeit fashion designs); Amway Corp. v. Procter & Gamble Co., 2001 U.S. Dist. LEXIS 14455 (W.D. Mich. 2001)(dismissing claims against corporations and law firm for providing litigation documents to consultant who posted them with criticism of Amway on website); I. M. L. v. Utah, 2002 UT 110, 2002.Utah LEXIS 171 (Utah Supreme Court November 15, 2002)(dismissing criminal libel charge against high school student for website satirizing, criticizing and mocking high school principal, teachers and students, applying "actual malice" standard and invalidating century old criminal libel statute resembling Alien and Sedition Acts); Mathis a/k/a "duelly41" v. Cannon, 2002 Ga. LEXIS 1071 (Georgia Supreme Court, November 25, 2002)(limited public figure status for Internet speech regarding public controversy and public funds precludes any punitive damages for web posting). Demands to criminalize, punish or censor protected activity, violate the First Amendment and delay justice should be rejected.

Respectfully submitted,

EDWARD A. SLAVIN, JR.
COUNSEL FOR COMPLAINANT DANIEL S. SOMERSON

CERTIFICATE OF SERVICE
This document was on December 2, 2002 mailed/faxed to the Court and to Messrs Somerson, Davis, Moore, Bachman and Ms. Brewer, Esquires and mailed to Senior Special Agent Robert E. Tyndall (Retired) and the DOL and USPS IGs. Edward A. Slavin, Jr.

EXHIBIT D

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 14 November 2002

In the Matter of:

DANIEL S. SOMERSON,
Complainant,

v.

MAIL CONTRACTORS OF AMERICA, INC.,
Respondent.

CASE NO: 2002-STA-44

ORDER TO SHOW CAUSE

On November 7, 2002, Respondent filed a Motion Seeking Protective Order and Witness Interview Restriction, alleging that "[b]oth before and following the September 10-19, 2002 hearing in this matter Complainant has (a) directly and recently anonymously sent Respondent's counsel and Respondent's management witnesses insulting and abusive e-mails, a practice that continues to date, and (b) opened anonymous web sites directed at both the undersigned counsel and Respondent." Attachment A to the motion consists of twelve samples of such e-mails one apparently directed to the prospective witness Gray, two to the witness Cole, who has previously testified, and six to Respondent's counsel Davis. The attachment also includes two pages, apparently from a website, containing similar abusive characterizations directed at counsel Davis, an officer of the court. The communications are vulgar, abusive, and in some cases, Respondent suggests with good cause, implicitly threatening. Respondent requests that this tribunal issue a show cause order as prelude to issuance of a Protective Order prohibiting all such conduct or similar activities in the future. Respondent also requests reconsideration of the suggestion of this tribunal to Respondent's counsel that the interview of Respondent's supervisor, Richard Mason by Complainant's counsel be allowed outside of the presence of Respondent's counsel and that any such interview be so arranged that Respondent's counsel can be present telephonically.

Although the communications identified by Respondent's counsel are facially anonymous, Respondent suggests that there is no doubt that Complainant is responsible for them. The circumstances so suggest. However, Complainant's counsel has filed a response renewing his prior motion previously denied to disqualify Mr. Davis as counsel and filing Complainant's "Twelfth Motion In Limine and Motion To Strike the Impertinent, Irrelevant Filing of Alleged Post Trial Protected Activity." Complainant's response suggests that Respondent is seeking to prejudice the Court with

EXHIBIT 2

evidence of alleged protected activity, to wit, the post-firing status of either Complainant's web site or other web sites, and suggests that the argument and exhibits should be stricken as irrelevant. The nature and circumstances of the communications, however, suggest an intentional interference with the processes of justice. Implicit in Complainant's response, which includes a reiteration of free speech rights, and does not include a denial, is an admission that Complainant is the source of the offensive material.

In connection with a previous proceeding before the Office of Administrative Law Judges, a Consent Order was issued in re Daniel S. Somerson, Case No.: 3:02-ev-121-J-20-TEM, Unmited States District Court, Middle District of Florida, Jacksonville Division, which ordered, *inter alia*, "[t]hat Daniel Somerson shall conduct himself within the bounds of appropriate respect and decorum, albeit with allowance for appropriate zeal and vigor, during any proceedings, and any matter related thereto, held under the authority of the Office of Administrative Law Judges, U.S. Department of Labor, and regarding any other official purpose with any person or organization of the Office of Administrative Law Judges, U.S. Department of Labor, wherein Daniel S. Somerson is a party, a representative, a witness or other participant."

In addition, 29 CFR §18.36 provides that all persons appearing in proceedings before an administrative judge are expected to act with integrity, and in an ethical manner, and provides sanctions for refusal to adhere to reasonable standards of orderly and ethical conduct. 29 CFR §18.29 provides that the administrative law judge shall have all powers necessary to the conduct of fair and impartial hearing. Communications of the character alleged by Respondent are deemed inimical to the orderly conduct of a fair an impartial hearing, and inconsistent with the ethics and integrity appropriate to the conduct by the parties of such a hearing. Such conduct also tends predictably to cause complaints and other responses for just cause which create distractions and extraneous issues which require the attention of the tribunal. Complainant has ample notice that such behavior will not be tolerated. Wherefore,

Complainant is directed to show cause not later than close of business on November 18, 2002, why the facts relating to the misconduct alleged should not be certified to the U.S. District Court which has retained jurisdiction, and why the pending complaint, 2002 STA 44, should not be immediately dismissed with prejudice. As part of any response to this order, Complainant shall admit or deny that he is the originator of the communications complained of. Failure to admit or deny as required shall be deemed an implicit admission.

A

EDWARD TERHUNE MILLER
Administrative Law Judge

Washington, D.C.